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Supreme Court of the United States

OCTOBER TERM, A. D., 1953.

No. 212.

FORT DODGE, DES MOINES & SOUTHERN RAILROAD COMPANY AND IOWA-DES MOINES NATIONAL BANK,
Petitioners,

vs.

CATHARINE ALLEN GILLESPIE, EXECUTRIX OF THE ESTATE OF ALEXANDER J. GILLESPIE, DECEASED, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

NEILL GARRETT,
WENDELL B. GIBSON,
1204 Equitable Building,
Des Moines 9, Iowa,
ALLEN WHITFIELD,
WALTER W. SELVY,
616 Insurance Exchange Building,
Des Moines 9, Iowa,
Attorneys for Petitioners.

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CATHARINE ALLEN GILLESPIE, EXECUTRIX OF THE ESTATE OF ALEXANDER J. GILLESPIE, DECEASED, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States:

Petitioners Fort Dodge, Des Moines & Southern Railroad Company and Iowa-Des Moines National Bank respectfully state:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

The plan of reorganization adopted in a railroad reorganization proceeding provided for the exchange of bonds issued by the debtor for securities of the reorganized company and cash. In closing the case, the district court fixed a termination date upon this right to exchange and prescribed notice thereof by publication. After the termination date, a bondholder applied to the district court for an order authorizing and directing exchange of his bonds asserting that he had received no notice of the district court's order and that, in any event, he had complied with the exchange procedures. After resistance and trial, the district court denied the application. The circuit court of appeals reversed, holding the published notice was not a "reasonable notice" and relying upon *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865, and *City of New York* v. *New York, New Haven & Hartford Railroad Co.*, 344 U. S. 293, 73 S. Ct. 299, 97 L. Ed., Advance, p. 268.

Briefly, the facts were that in 1927, Alexander J. Gillespie purchased First Mortgage 5% Gold Bonds of the Fort Dodge, Des Moines and Southern Railroad Company (R. 18). These were "bearer" bonds (R. 65-66). In 1930, a receiver was appointed for the railroad in state court and a bondholder's protective committee was formed. Pursuant to a deposit agreement with the committee, Gillespie delivered his bonds to the Bankers Trust Company of New York in exchange for a certificate of deposit which he put in his safety deposit box (R. 17-19). In 1949, Gillespie attempted to sell the certificate of deposit and discovered the events which had happened in the nineteen year meantime (R. 18).

Meantime, the railroad continued in state court receivership and the bondholder's committee continued to operate until 1938 when it was dissolved. A second bondholder's committee was then formed and bondholders, including those who had deposited bonds with the first committee, were solicited by the second committee (R. 28). In 1939, the reorganization procedures of Section 77 of the Bankruptcy Act (U. S. C., Title 11, Sec. 205) were invoked and the United States District Court for the Southern District of Iowa assumed jurisdiction (R. 36).

The name of Alexander J. Gillespie, 1175 Park Avenue, New York City, appeared in the bankruptcy proceedings both from a list of bondholders who had received interest payments in 1929 and from a list of bondholders who had deposited bonds with the first bondholder's committee (R. 81-82). As such a "known" bondholder, he was given notification by mail at the listed address of the period within which claims might be filed in the reorganization proceeding (R. 79-80). He was also notified by mail at the listed address of his right to exchange his bonds (R. 66-67). The record on appeal was not burdened with the many other mailed and published notices given to "known" and "unknown" bondholders during the five year course of the bankruptcy proceedings (R. 83).

In 1931, Gillespie had moved from the Park Avenue address to Rye, New York, leaving a forwarding address where he actually received forwarded mail thereafter (R. 17). However, he testified that he did not receive any notices with regard to the railroad receivership or reorganization from the bondholder's committee, the state court receiver, the courts, the bankruptcy trustees, the Interstate Commerce Commission or elsewhere (R. 17-21).

After the plan of reorganization had been adopted in 1943, the district court entered two orders with relation to the right to exchange. Provision was made for mailed notification of the time and place of exchange to all "known" bondholders at their last known address (R. 54). In addition, the orders authorized the exchange agent to accept certificates of deposit which had been issued by the banks which were depositaries for the two bondholder's committees. As to the depositaries for the first bondholder's committees, it was provided that the bonds should be physically delivered to the exchange agent for cancellation and exchange upon surrender of the certificate of deposit therefor (R. 57). As to the depositary for the second bondholder's committee, it was provided that the depositary bank should retain the bonds for cremation after receipt of the cancelled certificate of deposit from the exchange agent (R. 53).

A year later, in 1944, the district court, in closing the case, fixed May 1, 1949, as the termination date of the right to exchange and prescribed a notice thereof to all bondholders to be published (R. 59-63).

As to Gillespie's claim that he had received no notice, the district court held that he had both actual and constructive notice (R. 88-89). Further, that even if the claim of no notice were accepted, he was not entitled to relief upon equitable principles (R. 90). As to Gillespie's claim that the delivery of his deposited bonds to the exchange agent effected an automatic exchange, the district court held that he had not followed the clearly defined procedures for exchange (R. 90-92).

The United States Court of Appeals for the Eighth Circuit in its opinion, *Gillespie* v. *Fort Dodge, D. M. & S. Ry. Co. et al.*, (R. 99-109) 203 F. 2d 119, 123, found that

the notice by publication was not a "reasonable notice" of the bar order and reversed. The court found it unnecessary to rule as to whether the exchange procedures had been complied with—at page 122 of the opinion (R. 106). The opinion is silent as to the pleaded defense of laches which had been considered by the district court (R. 90).

At page 123 of the opinion, the circuit court not only finds that another mailed notice should have been sent to Gillespie at the address listed in the bankruptcy proceeding but that "there were other means through which he might well have been reached" (R. 107).

Further, that the district court might well have ordered "that steps be taken to find him (Gillespie)" if the court had been informed of the fact that a letter had been sent and returned undelivered (R. 108).

BASIS FOR JURISDICTION TO REVIEW.

The statutory provisions believed to sustain jurisdiction to review are found in the 1948 Revision of the Judicial Code (Act of June 25, 1948, Chap. 646, 62 Stat. 928), particularly Title 28 U. S. C., Sec. 1254 (1) and in Section 24 of the Bankruptcy Act of July 1, 1898, as amended, particularly Title 11, U. S. C., Sec. 47 (c). In the Bankruptcy Act provision, the Supreme Court of the United States is vested with jurisdiction to review judgments, decrees and orders of the United States courts of appeals in bankruptcy proceedings in accordance with the currently effective provisions of the laws of the United States. The provision of the Revised Judicial Code states that cases in the courts of appeals may be reveiwed by the Supreme Court by writ of certiorari granted upon the

petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U. S. C. A. 1254 (1).

11 U. S. C. A. 47 (c).

The case involves an application made in a railroad reorganization proceedings under Section 77 of the Bankruptcy Act (Act of March 3, 1933, Chap. 204, 47 Stat. 1474 as amended 49 Stat. 911), Title 11, U. S. C., Sec. 205. The sufficiency of a notice with regard to a bondholder of the debtor is questioned as being violative of a statutory command for "reasonable notice" and of the due process requirements of the Fifth Amendment to the Constitution of the United States. The Circuit Court of Appeals for the Eighth Circuit (R. 108) (page 123 of the opinion) found the statutory command in Section 77 (c) (8) of the Bankruptcy Act, 11 U. S. C. A. 205 (c) (8), which reads:

> "(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise."

With this petitioners do not agree. Rather, because the bondholder had already been given the notice referred to in Section 77 (c) (8) by publication and mail (R. 79-80) and because his claim and right to exchange had long since been established, it is believed that a provision of Section 77 (f) of the Bankruptcy Act, 11 U. S. C. A. 205 (c) is involved. This reads:

> "Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case."

In either event, the interpretation and construction of federal statutes and the Constitution of the United States is involved.

The Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the district court with direction that the application for exchange be granted in its opinion dated March 30, 1953. Such judgment became final with denial of the petition for rehearing on May 8, 1953 (R. 139). The petition for writ of certiorari, the record and the supporting brief are to be filed with the Clerk of this Court within the period prescribed by Section 8 of the Act of February 13, 1925 (28 U. S. C. A. 2101).

The following cases are believed to sustain jurisdiction:

New York v. *New York, New Haven & Hartford Railroad Co.*, 344 U. S. 293, 73 S. Ct. 299, 97 L. Ed. (Advance, p. 268).

Gardner v. *New Jersey*, 329 U. S. 565, 67 S. Ct. 467, 91 L. Ed. 504.

James v. *Stone & Co.*, 227 U. S. 410, 33 S. Ct. 351, 57 L. Ed. 573.

Therefore, the Supreme Court of the United States may review the decision in this case involving a controversy arising out of a railroad reorganization under the Bankruptcy Act. The reasons for a review on writ of certiorari as a matter of sound judicial discretion are later set forth.

The questions now to be presented are believed to be substantial upon the following grounds:

1. Matters involved include the asserted failure of a federal court to comply with the command of a federal statute and the due process requirement of the Fifth Amendment to the Constitution.

2. The case of *Mullane* v. *Central Hanover Bank & Trust Company, supra,* requires a complete consideration of the particular facts and procedures involved in a claim of inadequate notice. It is contended that the rule of that case is substantially enlarged by decision and dictum in this case thus presenting substantial questions for review.

3. The reinstatement of rights in this case may well affect the financial structures of many other reorganized companies throughout the United States. It may be assumed, in the absence of statutory direction, that the procedures followed were those evolved from judicial experience with railroad reorganization proceedings.

4. The circuit court failed to pass upon an important question which was the right of the particular applicant to relief, with or without notice. It is contended that the failure to assert a timely claim is self defeating regardless of the procedure involved. While the exercise of appellate supervision may presuppose the consideration of all questions properly raised, it is believed that this question is substantial enough to warrant expression of opinion.

QUESTIONS PRESENTED.

Three questions were raised on appeal in the United States Court of Appeals for the Eighth Circuit and are here presented:

1. Were the due process requirements of the Fifth Amendment to the Constitution of the United States satisfied by publication of notice fixing the expiration date for the right to exchange under a plan adopted in a railroad reorganization proceeding in bankrupty with reference to all of the circumstances of this case?

2. Did the particular applicant comply with the exchange procedures in force by reason of the fact that his

bonds came into the physical possession of the exchange agent by court order?

3. Even if the contention that the published notice was insufficient be accepted, was the applicant guilty of such inexcusable delay and laches as to justify the denial of relief by the district court?

The opinion of the United States Court of Appeals for the Eighth Circuit adds the following questions now presented:

4. Was there a statutory command for "reasonable notice" applicable with which the district court did not comply when it ordered a published notice?

5. What steps, aside from published and mailed notice, should have been taken by the court to locate listed bondholders who had not exchanged their securities?

6. Should the question of laches, question numbered "3" above, have been considered upon appeal of this case?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The United States Court of Appeals for the Eighth Circuit has decided a question arising under the Bankruptcy Laws of the United States in a way which is probably in conflict with the applicable decisions of this Court.

The cases of *City of New York* v. *New York, New Haven & Hartford Railroad Co., supra,* and *Mullane* v. *Central Hanover Bank & Trust Co., supra,* do not require or authorize the decision in this case. The City of New York case dealt with the failure to give a statutory "reasonable notice" of the time for filing claims in order to participate in a railroad reorganization. The Mullane

case dealt with a state statute which prescribed published notice of a binding accounting of trustees as to known beneficiaries and held this to be insufficient notice to satisfy the due process requirements of the Fourteenth Amendment. The Mullane case, in particular, discusses the due process requirements of the Constitution as they relate to notifications in judicial proceedings. It is submitted that the circumstances of this case are such that due process requirements were satisfied within the meaning of that discussion. As to the City of New York decision, the bondholder's claim and right to participate had been established by a claim filed on his behalf in accordance with 11 U. S. C. A., Sec. 205 (c) (7). The problem arises after the completion of the statutory scheme for railroad reorganization with its pattern of notifications to listed bondholders and in connection with the expiration of the right to exchange under the plan of reorganization adopted. In other words, it is not a question of no notice, but a question of whether another notice was required by statute or otherwise.

2. The United States Court of Appeals for the Eighth Circuit has rendered a decision which is believed to be in substantial conflict with decisions of the United States Court of Appeals for the Second Circuit on the same subject matter in:

North American Car Corp. v. *Peerless Weighing & Vending Machine Corp.*, (C. C. A. 2nd, 1944) 143 F. 2d 938.

Mohonk Realty Corp. v. *Wise Shoe Stores*, (C. C. A. 2nd, 1940) 111 F. 2d 287.

Duebler v. *Sherneth Corp.*, (C. C. A. 2nd, 1947) 160 Fed. 472.

All of these decisions by Circuit Judge Clark deal with bar orders entered with regard to the right to ex-

change in corporate reorganizations under Section 77 B of the Bankruptcy Act, 11 U. S. C. A. 207. In each instance, the right to exchange was denied upon equitable grounds and the matter of notification was swept aside as unimportant under the circumstances. In reading these cases, it is helpful to realize that the corporate reorganization sections of the Bankruptcy Act did not contain a definite provision as to the termination of the right to exchange until the Act of June 22, 1938. 11 U. S. C. A. 604. The railroad reorganization sections of the Bankruptcy Act still do not contain such definite provisions. In any event, these cases stand in direct conflict with the proposition that an exchange must be ordered in all circumstances where an inadequate notice or no notice was given as to the expiration of the right to exchange.

3. The Circuit Court of Appeals for the Eighth Circuit has departed from the usual course of judicial procedure in failing to express its consideration of an issue presented so as to call for an exercise of this Court's power of supervision. The question of inexcusable delay and laches was raised in the pleadings and considered by the district court. Likewise, this question was presented to the circuit court but the opinion is silent as to this question.

4. The Circuit Court of Appeals for the Eighth Circuit has applied the provisions of the federal statute to a set of facts to which such provisions are not applicable.

Sections 77 (c) (7) and (8) of the Bankruptcy Act, 11 U. S. C. A. 205 (c) (7) and (8), provide:

> "(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate ex-

cept on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, and for the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization.

"(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise."

The Act elsewhere defines claims in Section 77 (b), 11 U. S. C. A. 205 (b), as:

"The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

It is respectfully submitted that these statutory provisions refer to the filing of claims in order to participate in the reorganization proceedings. This "reasonable notice" was given to the bondholder in question by mail in this proceeding (R. 79-80). His claim had been filed and

he was entitled to participate in the reorganization. As to him, the statutory scheme was complete. He needed only to complete the exchange. We find no statutory requirement of "reasonable notice" applicable as did the circuit court.

We believe that a provision of Section 77 (8), 11 U. S. C. A. 205 (f), applies to the action taken by the district court as to notification, to-wit:

> "Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case."

We think it very important that the right statutory provision be placed in question.

[5.] The Circuit Court of Appeals for the Eighth Circuit has considered the question of the efforts which should or might have been made to locate a listed bondholder in a railroad reorganization proceedings. Apparently, the court should initiate an investigative procedure including recourse to charge accounts, credit bureaus and "other means." A letter should have been sent to the depositary for a non-existent bondholder's committee. If a notification were returned undelivered, then the court should direct "that steps be taken to find him." It is submitted that such actions are not required by the applicable decisions of this court and that the decision in this case is certain to raise considerable doubt and confusion in the minds of district courts who are called upon to act in railroad reorganization and other matters where numbers of persons with a possible interest are involved.

A record is furnished herewith in compliance with Rule 38.

Wherefore, your petitioners pray that this court grant a writ of certiorari to be issued out of and under the Seal of this Court directed to the United States Court of Appeals for the Eighth Circuit, to remove therefrom for review here the record in Cause No. 14,442 in Bankruptcy, wherein your petitioners are appellees and the respondent is appellant, and that the said opinion, judgment and decree of the United States Court of Appeals for the Eighth Circuit be reversed by this Court, and that the petitioners have such other, further or different relief as may be just and equitable.

Fort Dodge, Des Moines & Southern Railroad Company and Iowa-Des Moines National Bank,

By NEILL GARRETT,
WENDELL B. GIBSON,
ALLEN WHITFIELD,
WALTER W. SELVY,
Attorneys for Petitioners.

SUPPORTING BRIEF.

A concise statement of the case is contained in the foregoing petition as a summary and short statement of the matter involved and is not repeated. Grounds for jurisdiction are likewise set forth in the petition as the basis for jurisdiction and not repeated.

Assigned errors would be presented as follows:

1. The Circuit Court of Appeals for the Eighth Circuit erred in holding that notice by publication alone was not "reasonable notice" under the circumstances in this case.

2. The Circuit Court of Appeals for the Eighth Circuit erred in not holding that the particular applicant was guilty of laches such as to justify the denial of relief by the district court.

3. The Circuit Court of Appeals for the Eighth Circuit erred in failing to consider the question of laches upon the part of the applicant.

4. The Circuit Court of Appeals for the Eighth Circuit erred in holding that there was a statutory command for "reasonable notice" applicable in this case.

5. The Circuit Court of Appeals for the Eighth Circuit erred in holding that investigative steps in adtion to notice were necessary under the circumstances of this case.

In order to be direct and concise, we will confine the scope of this brief to a discussion of a few leading cases under the appropriate questions presented in the petition.

1. Were the due process requirements of the Fifth Amendment to the Constitution of the United States satisfied by publication of notice fixing the expiration date for the right to exchange under a plan adopted in a railroad reorganization proceeding in bankruptcy with reference to all of the circumstances of the case?

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 94 L. Ed. 865, 70 S. Ct. 652.

City of New York v. *New York, New Haven & Hartford Railroad Co.*, 344 U. S. 293, 97 L. Ed. (Advance, p. 268), 73 S. Ct. 299.

Hanover National Bank v. *Moyses*, 186 U. S. 181, 46 L. Ed. 1113, 22 S. Ct. 857.

Each of the cited cases deals with the due process requirements of the Constitution as to notifications in judicial proceedings. The latter two cases deal specifically with the federal bankruptcy statutes.

The Mullane case stands for the proposition that due process requires the choice of a form of notice that is not substantially less likely to convey the desired information than other means which might reasonably have been employed. The inadequacies of published notice as compared to notice by mail and actual notice are pointed out. However, the Court recognizes that published notice may be defended according to the practicalities and peculiarities of the case.

In this view, we think that the situation which confronted the district court in this case should be examined. Bearer bonds of the debtor were outstanding (R. 65). The trustees, obeying the dictate of Section 77 (c) (4) of the Bankruptcy Act, 11 U. S. C. A. 205 (c) (4), had furnished the court with two lists of "known bondholders" with their "last known post-office address or place of business."

One of these was a list of bondholders who had received interest payments in 1929 and the other was a list of bondholders who had deposited bonds with two bondholders committees formed while the railroad was in state court receivership (R. 81-82). These lists had been used by the court throughout the statutory course of the reorganization. Mailed notice of the time for filing claims had been given to these "known bondholders" (R. 29, 77-81). Many other notices had been mailed or published during the proceedings (R. 33, 34, 83). Now, the case was to be closed. The lists and addresses were many years old. They had been canvassed repeatedly in accordance with the statutory scheme. The court, exercising its equitable powers, desired to fix a date for the termination of the right to exchange old securities for new under the plan of reorganization. The statute furnished no guide for the contemplated action. Was another notice desirable, practical or necessary? If the district court had had the Mullane case at hand, another mailed notice might have been prescribed in an excess of caution. On the other hand, the district court might have relied upon the following language from page 316 of the Mullane opinion:

> "It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning."

Unless it be concluded that a bondholder has the right to assume that his right to exchange under a plan of railroad reorganization will never terminate, then certainly the listed bondholders (including the particular applicant) had been warned if it were possible to do so by ordinary mail.

Further, while the bondholders whose names appeared on the lists available to the court were "known bond-

holders" in the sense that they had once owned bonds, it does not follow that these persons owned the bonds many years later. The bonds, or certificates of deposit representing bonds, might well have changed hands many times in the interim. The court might well have concluded that these were missing persons in the sense that they either no longer owned the bonds and certificates of deposit or could not be reached by ordinary notification. In which event, the court might have relied upon the following language at page 317 of the Mullane opinion:

> "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that in the case of persons missing or unknown employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights."

After all, the court probably had the right to assume (and the Mullane case supports this proposition) that a person will not forget or ignore a valuable tangible asset indefinitely, especially when he receives a series of notifications relating to that asset.

The New York City case presented a different situation, from this case. There, the Court fixed a time for the filing of claims in order to participate in a railroad reorganization prescribing a published notice and a mailed notice. However, the mailed notice was directed only as to certain creditors, not including the City of New York which was a known lienholder. As the Court pointed out, the statute required that a "reasonable notice" of the time for filing such claims be given. Therefore, New York City never had a chance to participate in the reorganiza-

tion. In this case, the bondholder had every right and was afforded every opportunity to participate in the reorganization. His claim was allowed along with the claims of other bondholders. After the conclusion of the entire proceedings, a time limit was fixed for exchanging securities of the debtor for those of the reorganized company. The Court gave a published notice because it was the notice most likely to come to the attention of those who had not already been notified or who had failed to exchange their bonds after the usual notifications. Publication made the time limit a matter of general knowledge. Any person interested could have discovered about the time limit by simple inquiry at any brokerage house or bank throughout the United States. We cannot see that the New York City case demands the decision reached in this case.

We have cited the Hanover Bank case because it stands for the proposition that the bankruptcy laws of the United States must stand as a system and that a particular bankruptcy proceeding must be treated as a whole. It points out that such proceedings are *in rem* and the Congress has broad power to act in this matter of great public concern. It clearly points out that, while the bankruptcy laws may not be incompatible with fundamental law, they may be designed to accomplish their purpose and that notice prescribed may be such as the nature of the proceedings admit. While Section 77 of the Bankruptcy Act, 11 U. S. C. A. 205, does not provide an express means for termination of the right to exchange under a plan of reorganization adopted, it does provide for the closing of the estate upon an equitable basis (11 U. S. C. A. 77 (f)). We believe that the applicant in this case could only complain if he had been treated in a manner which was not equitable. The District Court shared this opinion,

carefully considered the case, and found no "appealing equities favoring applicant" (R. 90).

2. Did the particular applicant comply with the exchange procedures in force by reason of the fact that his bonds came into the physical possession of the exchange agent by court order?

This question arose from the fact that depositaries for two bondholder's committees were holding bonds which had not been called for by their customers. These depositaries (banks) had issued certificates of deposit for these bonds. In order to "facilitate" the exchange, the Court authorized the exchange agent to accept these certificates of deposit in exchange for the new securities (R. 52-55, 55-58). The orders of the Court provided for the giving of mailed and published notice of the time and place of exchange to the record holders of these certificates of deposit (R. 54). One of the banks retained the bonds and the other three banks delivered the bonds to the exchange agent, all in accordance with the order of the Court. Because his bonds were included in those delivered to the exchange agent, the applicant in District Court contended that this amounted to an automatic exchange. The District Court held that the applicant had not complied with the conditions for exchange which were clearly set forth in the Court orders. The Circuit Court did not pass upon this question.

3. Even if the contention that the published notice was insufficient be accepted, was the applicant guilty of such inexcusable delay and laches as to justify the denial of relief by the district court?

Duebler v. *Sherneth Corporation*, (C. C. A. 2d, 1947) 160 F. 2d 472.

North American Car Corp. v. *Peerless W. & V. Mach. Corp.*, (C. C. A. 2d, 1944) 143 F. 2d 938.
Mohonk Realty Corporation v. *Wise Shoe Stores*, (C. C. A. 2d, 1940) 111 F. 2d 287.

In this case, the District Court considered the facts from the standpoint of a complete lack of notice (R. 90). The Circuit Court of Appeals for the Second Circuit has considered several cases from this standpoint. These are all corporate reorganization cases rather than railroad reorganization cases, but two cases involve the expiration of a time limit fixed by the Court upon the right to exchange old securities for new under a plan for reorganization under bankruptcy.

In the Duebler case, the bondholders claimed that they did not have any actual knowledge or notice of the reorganization proceeding. It does not appear whether the names of these bondholders were included in the lists of bondholders available to the Court in the reorganization proceedings. Interest was paid upon the bonds after they acquired them so that it is likely that these names were on such a list. The reorganization proceedings were completed by a final order and, as in this case, the Court provided for the expiration of the right to exchange. The Court fixed a five year period just as the Court did in this case. The only notice ordered by the Court was a published notice. See page 473 of the opinion. It is true that the reorganized company made other efforts to contact security holders of the debtor. The provisions of 11 U. S. C. A. 604, became effective during the pendency of the proceedings. This provision of the corporate reorganization statutes gave express authority for a bar order. However, the Court recognized that the district court had clear authority to enter the bar order regardless of this statute. Likewise, we believe that the District Court in

this case had clear authority to enter the bar order and with this we do not believe that the respondent will quarrel.

To return to the Duebler case, the Court refused to modify the order of the Court to allow the exchange because it had no authority so to do. This, even though it found the personal situation of the bondholders to be "appealing." The Court recognizes the desirability of "bar orders" in the following language:

> "Secs. 204 and 205 thus provide a statutory scheme to afford a definite and final limit upon the exchange of securities under plans of reorganization. The allotment of time specified and allowed is not ungenerous. Here, indeed, it was nearly ten years from the start of proceedings; the appellees had taken no action for more than fourteen years. In view of the time necessarily consumed in devising and executing a revitalization of a defunct corporation, the period of limitation will certainly never be short. At any rate we have no authority to destroy the statutory scheme thus carefully planned. *Anderson* v. *Yungkau*, 67 S. Ct. 428, 430, 431."

The North American Car Corporation case involved a bondholder who had filed a written acceptance of a proposed plan of reorganization but complained that no notice had been received of a modification of the plan which fixed an expiration date upon the right to surrender and exchange securities. In accordance with the statutory procedure, creditors were given notice of the hearing upon the modification of the plan. There was considerable controversy about additional notifications from the reorganized company which would have informed the bondholder of the time limit. However, the Court believed this to be unimportant and held:

"Though the point appears not to have been passed upon specifically, it seems clear that failure to receive notice properly given does not affect the validity of the confirmation order, and only gives grounds for appeal to the court to exercise its discretion favorably. In *Mohonk Realty Corp.* v. *Wise Shoe Stores, supra,* we pointed out that a consummated reorganization plan is binding even as against creditors who were not scheduled and did not know of the proceeding; and we held nonjurisdictional the failure to give any notice of a final order winding up an estate and enjoining further action by creditors. Section 77B, while it provides for a hearing on modification of a plan 'upon notice to creditors and stockholders,' with a right of withdrawal of a previous acceptance if in the opinion of the judge the modification will be materially adverse to the interest of the acceptor, sub. f, yet elsewhere it provides that the judge, 'shall cause reasonable notice * * * of all hearings for the consideration of any proposed plan * * * to be given creditors and stockholders by publication or otherwise,' sub. c (7). Surely, therefore, the judge can have at least no greater obligation than to see that notice reasonably designed to bring the matter in ordinary course to the creditor's attention is given, and he cannot be held the insurer of actual receipt of the notice. Any other rule would make final settlement of bankruptcy cases virtually impossible and deprive bankruptcy of its oft-stressed *in rem* character. Cf. *Hanover Nat. Bank of City of New York* v. *Moyses,* 186 U. S. 181, 191, 192, 22 S. Ct. 857, 43 L. Ed. 1113; *In re Carobine,* (D. C. S. D. N. Y.) 8 F. Supp. 605; 3 Moore's Collier on Bankruptcy, 14th Ed., 1941, 482, 489-491, and cases cited.

In relation to this case, it is important that the Court considered the problem one which must be submitted to the sound discretion of the Court. In that case the Court considered the equitable basis for the relief sought. The Court denied relief in the following language:

"If, therefore, the matter is only one affording potential grounds for appeal for remedial favor by the court, we think the asserted lack of receipt of notice cannot have great weight under all the circumstances in view of claimant's inexplicable delay for eight years in betraying any interest in proceedings which it already knew were intended to affect its interests. When in March, 1935, it agreed to the plan calling for the exchange of its bonds for securities of the new corporation, it was obvious that the reorganization depended upon a general fulfillment of its conditions if the business was to be rehabilitated. Nevertheless it failed to make even inquiries until March, 1943, when the reorganization had been fully consummated and persons had bought stock in the new company in firm and justified reliance upon their knowledge of the amount of stock outstanding and their belief that it would not be further diluted to take care of other bond claims. Claimant's contention that the reservation of jurisdiction in the court's order of confirmation should have warned them of just that possibility does not seem to us sound; for there was nothing in that order fairly to notify them that one of its purposes was to destroy the obviously intended force of a bar provision of the plan many years after it had become effective. Courts have been reluctant to reopen bar orders of this sort after an estate has been disposed of and the position of the parties substantially changed. Many cases show denial of such petitions in circumstances more appealing than the present. *Kelby* v. *Prudence-Bonds Corp., supra; In re Thornycroft, Inc.*, 2 Cir., 120 F. 2d 469, 471; *In re Diana Shoe Corp.*, 2 Cir., 80 F. 2d 92, 94; *Standard Steel Works* v. *American Pipe & Steel Corp.*, 9 Cir., 111 F. 2d 1000; *Piedmont Ice & Coal Co.* v. *American Service Co.*, 4 Cir., 130 F. 2d 78; cf. *In re United Cigar Stores Co. of America*, 2 Cir., 82 F. 2d 744, 745."

The Mohonk Realty Company case involved a landlord who claimed that he had not been notified of the order

closing the estate and enjoining further action by creditors. The landlord was complaining because the reorganization plan permitted the new corporation to terminate the lease at will. The Court disposed of the landlord's contention in the following language:

> "Appellant also makes some claims of lack of notice which might be conceived of as jurisdictional. It is not denied that appellant was a party to all the reorganization proceedings, nor is it disputed that appellant received proper notice of the confirmation hearing.
>
> "But the order of June 30, 1939, winding up the estate and enjoining further action by creditors, was issued *ex parte,* without particular notice of appellant. The failure to give notice did not make the order invalid for lack of jurisdiction. A reorganization plan consummated under Chapter X is binding even as against creditors who were never scheduled and who never knew of the proceedings. Section 77B, sub. g, 11 U. S. C. A., Sec. 207, Sub. g; Chapter X, Sec. 224 (1), 11 U. S. C. A., Sec. 624 (1); Finletter, op. cit. *supra,* at 673. Although the record is silent we assume that a copy of the winding-up order was sent to appellant shortly after June 30, 1939. Yet appellant did nothing until November. A motion made so late and not addressed to an attack on the jurisdiction of the court to enter the order is directed to the court's discretion and reviewable only for abuse of that discretion."

There are many other cases where the Court has expressed reluctance to reopen bar orders and has considered the equities involved in a particular set of circumstances but the above are typical and all in the same circuit.

4. Was there a statutory command for "reasonable notice" applicable with which the district court did not comply when it ordered a published notice?

Section 77 of the Bankruptcy Act, 11 U. S. C. 205.

In the Petition for Writ of Certiorari, we have already quoted from the sections of the railroad reorganization statute which apply to this question. Of course, the entire statute must be read before our statement that there is no "statutory command" for a "reasonable notice" may be taken as true. It may be noted that the Circuit Court of Appeals was referring to and quoting directly from the case of the *City of New York* v. *New York, New Haven & Hartford Railroad Company, supra,* which dealt with the requirements for "reasonable notice" contained in Section 77(c) (8) of the Bankruptcy Act, 11 U. S. C. A. 205 (c) (8). This section specifically deals with the original filing of claims in a railroad reorganization proceedings in order that a creditor may participate in a reorganization. We do not believe that it applies to the orders fixing a termination date upon the right to exchange securities of the debtor for securities of the reorganization company. In other words, we think that the decision in this case must consider whether another notice was due as a matter of statute or equity as well as the question of whether the notice given met the requirements of due process under all of the circumstances.

5. What steps, aside from published or mailed notice, should have been taken by the court to locate listed bondholders who had not exchanged their securities?

Mullane v. *Central Hanover Bank and Trust Company,* 339 U. S. 306, 94 L. Ed. 865, 70 S. Ct. 652.

The Circuit Court of Appeals indicated that the district court should have made additional efforts to locate

bondholders who had not exchanged their securities. This, apparently, stems from some language in the Mullane case which appears at page 317 of the opinion, to-wit:

> "Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary."

The Circuit Court indicated at page 123 of the report of the opinion that the district court should have investigated as to charge accounts, credit bureaus and taken other steps or employed other means which might have located this bondholder (R. 107, 108).

One fundamental misunderstanding in this case arises from the fact that the Circuit Court assigns some sort of official status to the bondholders committee with whom this particular applicant did business. The Circuit Court says, again at page 123 of the reported opinion, that the bonds were available to the company for administration and that the physical custody of the bonds was maintained as directed by the Court (R. 107). As a matter of fact, dealings with the bondholder's committee was a matter of private contract (R. 28). The committee had no official standing before the Court and, as a matter of fact, had been dissolved long before the railroad reorganization proceedings were commenced (R. 28). In other words, the only way that ownership of bonds by this particular applicant was known to the Court was through a list which was furnished in accordance with the provisions of the Bankruptcy statutes. This evidence of ownership was, at the time of the entry of bar order in 1944, thirteen years old. This applicant could have no other rights than those which would have been accorded to any other persons whose names might have come into the reorganization

proceedings as former owners of bonds. We do not believe that the Court was under any duty to conduct independent investigations as to whether these persons still owned the bonds or the certificates of deposits representing the bonds or to make attempts to locate them outside the usual course of the statutory scheme.

6. Should the question of laches, question numbered "3" above, have been considered upon appeal of this case?
Remington on Bankruptcy, (1947) Volume XI, Section 4653, page 516.

We believe that the application in this case amounted to an application to modify the Court order with regard to the exchange of securities. In the absence of statutory direction, we even believe that it might have been within the discretion of the Court to grant such a modification under proper circumstances, despite the fact that we have already shown that a Circuit Court has refused to do so in a similar situation. The textbook which we have cited points out that Courts are reluctant to re-open bar orders limiting the time for the exchange of securities. This is especially true when the transfer of assets to the reorganized company has been completed, as was the situation in this case (R. 84). Even if there had no bar order, and the statute required none, it is our belief that the right to exchange would not remain forever open. The doctrine of stale demands and, possibly, state statutes of limitations would some day intervene. We believe that this question should have been considered.

CONCLUSION.

We have tried to be direct and concise in a matter which is extremely complicated. Citations and quotations could be extended indefinitely. The Bankruptcy Law is a complicated law and the fact situation is difficult to cover in short. However, for the purpose of the Petition for Writ of Certiorari, we believe that we have clearly shown the nature of the matters involved and the questions presented.

Respectfully submitted,

NEILL GARRETT,
WENDELL B. GIBSON,
ALLEN WHITFIELD,
WALTER W. SELVY,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1959.

No. 212

FORT DODGE, DES MOINES & SOUTHERN RAILROAD COMPANY AND IOWA-DES MOINES NATIONAL BANK,
Petitioners,

vs.

CATHARINE ALLEN GILLESPIE, EXECUTRIX OF THE ESTATE OF ALEXANDER J. GILLESPIE, DECEASED, *Respondent.*

RESPONDENT'S BRIEF IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI

Robert J. Higgins,
Paul Ahlers,
James E. Cooney,
1012-1020 Bankers Trust Building,
Des Moines 9, Iowa,
Attorneys for Respondent.

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CATHARINE ALLEN GILLESPIE, EXECUTRIX OF THE ESTATE OF ALEXANDER J. GILLESPIE, DECEASED, *Respondent.*

RESPONDENT'S BRIEF IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

A STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Petitioners claim Writ of Certiorari should be allowed on the following grounds:

(1) The Court of Appeals' decision is in conflict with the cases of *City of New York* v. *New York, New Haven and Hartford Railroad Company*, 344 U. S. 293, 73 S. Ct. 299, 97 L. Ed., Advance p. 268, and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865.

(2) The Court of Appeals' decision is in conflict with decisions in the Court of Appeals for the Second Circuit.

(3) Failure of the Court of Appeals to express an opinion of the question of laches entitles petitioners to review.

(4) The Court of Appeals applied the provisions of a Federal statute to a set of facts to which such provisions are not applicable.

(5) The Court of Appeals considered the question of the efforts which should have been made to locate a listed bondholder in a railroad reorganization proceeding.

Respondent resists the petition and urges that the petitioners have failed to state reasons sufficiently special and important for this court to review this case. The respondent's reasons are set out fully below.

A CONCISE STATEMENT OF THE CASE.

Gillespie, a bondholder of a railroad in reorganization, applied to the district court to exchange his bonds pursuant to a plan of reorganization. Gillespie urged two points: (1) That an order directing bonds to be sent to the Iowa-Des Moines National Bank for exchange was complied with before the cut off date, and (2) that he had been deprived of his property without due process of law since he had received no notice of the setting of a cut off date.

The district court denied the application. The Court of Appeals for the Eighth Circuit reversed and held that a published notice of a "bar" order was not sufficient notice to a bondholder whose address appeared in the bankruptcy proceedings and records. The Court of Appeals relied upon *Mulane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865, and *City of New York* v. *New York, New Haven and Hartford Railroad Company*, 344 U. S. 293, 73 S. Ct. 299, 97 L. Ed. Advance, p. 268. The Court of Appeals did not pass on Gillespie's contention that he had complied with the bar order and the notice published because his bonds were in possession of the exchange agent before the cut off date.

The railroad was placed in receivership on the petition of a creditor, on or about February 18, 1930, and its property was administered under the supervision of the State Court until November, 1939, at which time the receivership was removed and reorganization of the property commenced under the provisions of the National Bankruptcy Law. On or about February 10, 1930, a Bondholders' Protective Committee entered into a Deposit Agreement with Bankers Trust Company, New York, Old Colony Trust Company, Boston, and Rhode Island Hospital Trust Company of Providence as depositaries (Record pages 26 and 27). In the year 1930 the Bondholders' Protective Committee referred to above, was dissolved and shortly thereafter a second Bondholders' Protective Committee was formed and the First National Bank of Philadelphia, Pennsylvania, was named depositary (Record page 27). The second Bondholders' Protective Committee was the successor to the first Bondholders' Protective Committee. The second Bondholders' Committee continued from the time of its formation in 1938 until the railroad went into reorganization under the Bankruptcy Law (Record page 28). On

July 16, 1941, the District Court approved a plan of reorganization, which plan was later approved by the Interstate Commerce Commission, by which Alexander J. Gillespie would be entitled to receive from the reorganized company bonds, stock and cash.

Alexander J. Gillespie, the applicant in this case, became the owner of Fort Dodge, Des Moines & Southern Railroad Company First Mortgage 5% Bonds February 14, 1927 (Record page 18). Gillespie's broker, Phillips & Zoeller, handled his bonds and deposited them with the Bankers Trust Company of New York in accordance with the Deposit Agreement dated February 10, 1930, and in exchange therefor received a Certificate of Deposit. In the year 1932, the Certificate of Deposit was delivered to Gillespie by his broker and placed by Gillespie in his safety deposit box in Harrison, New York, where it remained until July, 1949 (Record pages 18 and 20). Gillespie resided at 1175 Park Avenue, New York City, for some time prior to the time he purchased the bonds and until 1931, at which time he moved to Stratford and Archer Roads, Rye, New York (Record page 16). At the time Gillespie moved from 1175 Park Avenue, he left a forwarding address to Stratford and Archer Roads, Rye, New York, and mail had been forwarded to him from time to time, the last being in 1946 (Record page 17). From 1941, to 1944, Gillespie's office as well as his residence was at Rye, New York (Record page 16). From 1944 to 1948, he maintained an office at 663 Fifth Avenue, New York City, and during that period was an official of a cosmetic concern. Since 1948, Gillespie's home and office address has been Stratford and Archer Roads, Rye, New York. Gillespie has maintained charge accounts in all leading New York stores since 1922 (Record page 17). He is listed and rated in the Credit Bureau of Greater New York and has

been a depositor in the National City Bank, New York City, since 1922 (Record page 17). He was on the voting list of New York City up to 1931 (Record page 17). Gillespie had no knowledge of the receivership proceedings, the reorganization proceedings in Federal Court, nor of the right to exchange his Fort Dodge, Des Moines & Southern Railroad Bonds for bonds, stock and cash in the reorganized company until July, 1949, when he brought his Certificate of Deposit to the National City Bank for the purpose of selling it (Record pages 17 and 18).

The principal court orders and notices having to do with the exchange of securities are as follows:

On March 27, 1943, the court entered an order upon the application of the Reorganization Committee and generally providing for the conveyance of the property from the railroad to the newly reorganized railway company (Record page 44). The effective date of the transfer of the assets was ordered to be May 1, 1943. The order further provided for the exchange of the old bonds for bonds and stock in the reorganized company with cash. There is no reference in this order to anything which was required or necessary on the part of owners or holders of Certificates of Deposit.

On April 17, 1943, upon the application of the Reorganization Committee the court authorized the Reorganization Committee to delegate certain of its powers to the Iowa-Des Moines National Bank and to the First National Bank of Philadelphia (Record pages 52, *et seq.*). The court granted the Reorganization Committee the authority to delegate to each of the banks the right to make the exchange of bonds for the new securities and cash and to do other administrative acts in connection therewith. The court also approved the form of the "Letter of Trans-

mittal" (Record page 41). The court also ordered notice of the time and place of exchange of securities given to the holders of Bonds and the owners and holders of Certificates of Deposit issued by First National Bank of Philadelphia by letter addressed to the owners of said Bonds and Certificates of Deposit and by publishing a notice of the same in the New York Times and the Des Moines Register. There was no reference in this order to Certificates of Deposit issued by the Bankers Trust Company of New York. The notice published in the Des Moines Register and the New York Times pursuant to this order was directed to holders of Bonds and no reference was made to holders of Certificates of Deposit. This notice also stated that the bonds could be exchanged beginning May 15, 1943, but failed to provide a cut off date after which exchange could not be made. The letter of transmittal of the Reorganization Committee (Record page 41) was directed to owners of bonds and owners of Certificates of Deposit issued by the First National Bank of Philadelphia. The letter indicated that exchange of securities would commence on May 15, 1943, but provided for no cut off date (Record page 41).

On June 16, 1943, on application of the Reorganization Committee, the court authorized the Iowa-Des Moines National Bank to receive bonds from the Bankers Trust Company and to make the exchange provided in the orders of Court of March 27, 1943, and April 17, 1943 (Record page 55). The court authorized the Iowa-Des Moines National Bank to receive bonds and to hold said bonds until the surrender of the Certificates of Deposit representing them. The order of June 16, 1943, provided for no cut off date with respect to surrender of Certificates of Deposit and there was nothing mandatory about the order requiring the owners of the Certificates of De-

posit to turn them over to the Iowa-Des Moines National Bank since they were only authorized to so surrender them to the Bank. There was no notice given either by mailing or publication of this order of court.

On May 2, 1944, the court entered an order approving the final report of the Reorganization Committee, ordering the Iowa-Des Moines National Bank to continue the exchange until May 1, 1949, and finally ordering a notice to be published in the New York Times and the Des Moines Register which provided that the Bonds must be presented for exchange to the Iowa-Des Moines National Bank on or before May 1, 1949, and if not so presented, all further rights in the holders of said Bonds would cease and be cut off (Record page 59). The court ordered the transfer of funds and assets from the old company to the reorganized company and relieved the Reorganization Committee from further duties. The court retained jurisdiction for the purpose of making further orders. The order of court and the notice published pursuant to the order of the court made no reference to holders of Certificates of Deposit and advised only that the owners of the Bonds would be required to turn the bonds in for exchange on or before May 1, 1949.

On August 5, 1943, the exchange bank sent a letter addressed to Gillespie which was returned as not delivered (Record pages 66-67). The undelivered letter from the Bank informed Gillespie of his exchange rights and requested the return of Gillespie's Certificate of Deposit. There is nothing in the letter which placed any deadline or cut off date as far as the delivery of the Certificate of Deposit was concerned.

ARGUMENT.

I. The Supreme Court should deny review of this case because the decision of the Court of Appeals is correct, and not in conflict with decisions of the Supreme Court nor of the Court of Appeals for the Second Circuit; Petitioners have failed to state reasons sufficiently special and important to justify review.

City of New York v. *New York, New Haven and Hartford Railroad Company,* 344 U. S. 293, 73 S. Ct. 299, 97 L. Ed., Advance p. 268.

Duebler v. *Sherneth Corp.,* (C. C. A. 2d, 1947) 160 F. 2d 472.

Mohonk Realty Corp. v. *Wise Shoe Stores,* (C. C. A. 2d, 1940) 111 F. 2d 287.

Mullane v .*Central Hanover Bank & Trust Co.,* 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865.

North American Car Corp. v. *Peerless Weighing & Vending Machine Corp.,* (C. C. A. 2d, 1944) 143 F. 2d 938.

The decision of the Court of Appeals in the case at bar is in harmony with both the Mullane case and the New York City case. All three cases are consistent with the proposition that it is a denial of due process of law to cut off property rights pursuant to a published notice where the person to be notified has an address on record or on file. In the case at bar Gillespie's address, 175 Park Avenue, New York City, appeared in the bankruptcy proceedings both from a list of bondholders, who had received interest payments in 1929 and from a list of bondholders, who had deposited bonds in the Bankers Trust Company in New York. Mail was forwarded from Gillespie's registered address from time to time. The last

occasion was in 1946. Under these circumstances the Court of Appeals would have erred had it held that a mere published notice was reasonable under the due process of law requirement of the United States Constitution. The holding of the Court of Appeals in the case at bar is required by the decisions in the Mullane and New York City cases.

Petitioners contend that the decision of the Court of Appeals in the case at bar is in conflict with the decisions of the Court of Appeals for the Second Circuit on the same subject matter. In this connection the petitioners cite:

Duebler v. *Sherneth Corp.*, (C. C. A. 2d, 1947) 160 F. 2d 472.

North American Car Corp. v. *Peerless Weighing & Vending Machine Corp.*, (C. C. A. 2d, 1944) 143 F. 2d 938.

Mohonk Realty Corp. v. *Wise Shoe Stores*, (C. C. A. 2d, 1940) 111 F. 2d 287.

None of the cases cited are in conflict with the decision of the Court of Appeals in the case at bar. It must be remembered that the Court of Appeals' holding in the case at bar was based on the failure of the District Court to require other than a published notice when the bondholder's name and address were on file.

In *Duebler* v. *Sherneth Corp.*, (C. C. A. 2d, 1947) 160 F. 2d 472, the trial court found that, in addition to a published notice, a notice by letter was given to each holder of old or new securities so far as known. In addition, the questions in the Duebler case were of reopening and of the power of the Court to disregard the bar provision and to set aside the Final Order. In the case at bar no such questions are involved.

In *North American Car Corp.* v. *Peerless Weighing & Vending Machine Corp.*, (C. C. A. 2d, 1944) 143 F. 2d 938,

we find a situation in which a security holder to whom four communications had been addressed, any one of which would have informed him of the existence of the bar order and the time limit on the right to exchange. This case is distinguishable with the case at bar for the further reason that it is an application to modify the Order confirming the reorganization plan and for an extension of time in which to exchange securities. The Court had the further questions of subsequent investors who had relied on the plan and on the bar Order.

The case of *Mohonk Realty Corp.* v. *Wise Shoe Stores,* (C. C. A. 2d, 1940) 111 F. 2d 287, involves a motion to set aside an Order Approving Reorganization and to reopen the case. New money had been invested in the company since the closing of the case. No question of the exchange rights of security holders was involved.

In all three decisions relied on by petitioners, the relief requested involved either the setting aside of the Final Order or an Order reopening the case. In the case at bar neither of these is required. It should be further noted that all three decisions relied on by the petitioners were decided prior to the decisions of this Court in the Mullane case and the New York City case.

Petitioners contend that they are entitled to review because the Court of Appeals in the case at bar failed to pass on the question of laches. Because of the view the Court of Appeals took of the case with respect to the constitutional question, the question of laches is not important.

The other grounds for review claimed by petitioners are of small consequence. The dictum of the Court of Appeals with respect to appropriate action by the Court in case a sufficient notice has been given by publishing and by mailing cannot furnish grounds for review. The hold-

ing of the Court of Appeals with respect to the lack of reasonable notice is clear, correct, and in complete accord with the rulings of this Court in the Mullane case and the New York City case. The contention of the petitioners that the Court of Appeals erroneously applied an inapplicable statute to the facts even, if considered correct for the purpose of the argument, is not a sufficient basis for the review. This is so because the Mullane case and the New York City case required a ruling that as to Gillespie, a bond holder of the railroad with a list of last known addresses, service of the "Court Bar Order" by publishing alone was inadequate and insufficient.

II. The decision is correct on grounds not considered by the Court of Appeals; Gillespie's bonds were in possession of exchange agent before cut off date as required by the "bar" order and published notice.

Although the Court of Appeals in the case at bar did not pass upon this contention of the bond holder, it had this to say at 203 F. 2d 122:

> "It is Gillespie's position that since his bonds were in the possession of the Des Moines bank, as they admittedly were, that he had 'surrendered' them to the bank in conformity with court orders and that he therefore was entitled to exchange under the plan or reorganization. There is a certain appeal to appellant's contention under this point, but since in the view we take of the case, the cause must be reversed on the other ground, we declare no ruling on this point."

The "Bar Order" of May 2, 1944, and newspaper notice published pursuant thereto provided that bonds of the railroad company must be presented for exchange to the Iowa Des Moines National Bank on or before May 1, 1949. At all times after July 1, 1943, Gillespie's bonds were in pos-

session of the Iowa-Des Moines National Bank (Record pages 21 and 22). Nothing in either the Court Order of May 2, 1944, or the notice published pursuant thereto required or even suggested that the bondholders, in order to participate in the exchange, would be required to surrender certificates of deposit on or before May 1, 1949. The reason assigned for denying Gillespie his exchange rights was his failure to surrender his certificate of deposit before May 1, 1949. Nothing in the bar order or published notice of the bar order required such action.

Under the undisputed Record of the case Gillespie had no personal knowledge of any of the reorganization proceedings. Assuming for the purpose of the argument that Gillespie had personal knowledge of all orders and notices relating to the surrender of his securities and the turning in of his certificate of deposit, nothing in the proceedings of record required Gillespie to turn in his certificate of deposit by May 1, 1949, in order to participate in the exchange.

The court order of March 27, 1943 (Record pages 44-52), provided:

> "g. That the reorganized company deliver to the owners of the 'First Mortgage 5% Gold Bonds' of the debtor company, upon the surrender thereof (the bonds, stock and cash provided for in the exchange plan)."

The court also provided:

> "It is further ordered that the First Mortgage 5% Gold Bonds of the debtor company to be exchanged for the securities of the reorganized company may be tendered for exchange with or without all unpaid interest coupons originally attached thereto, but, after the consummation of the exchange, all of the said bonds of the debtor company so exchanged and all

interest coupons originally attached thereto shall be null and void."

It should be particularly noted that nothing in the court order of March 27, 1943, required or even referred to any surrender or bringing in of certificates of deposit as a condition precedent to the making of the exchange.

The court order dated April 17, 1943 (Record pages 52-55), made the Iowa-Des Moines National Bank the exchange agent with respect to the holders of First Mortgage Gold Bonds and holders of certificates of deposit for such bonds issued by the First National Bank of Philadelphia. The order authorized the bank to perform certain administrative functions in connection with the exchange such as cancelling certificates of deposit, cremating bonds and preparing certificates of cremation. The court approved the form of "Letter of Transmittal" (Record pages 41-43). In addition the court ordered notice to be given to the holders of Bonds and to holders of certificates of deposit issued by the First National Bank of Philadelphia by mailing and by publishing a notice in the New York Times and the Des Moines Register. (The mailed notice appears as Exhibit "3," Record pages 41-42.) (The notice published in the newspaper appears as Exhibit "2," Record page 40.) Nothing in the court order of April 17, 1943, applied to Gillespie since it designated as persons to be notified, holders of certificates of deposit issued by the First National Bank of Philadelphia. Gillespie's bonds at that time were on deposit with the Bankers Trust Company of New York and he held a certificate of deposit issued by that bank. The court order of April 17, 1943, neither referred to certificates of deposit issued by Bankers Trust Company of New York nor did it establish any date after which any certificates of deposit might not be turned in to participate in the exchange.

The notice published pursuant to the order of April 17, 1943, referred only to bondholders and required "all such First Mortgage 5% Gold Bonds should be presented for exchange to the said Iowa-Des Moines National Bank and Trust Company at its banking house on or after said date" (Record page 40). Nothing under that notice required anything to be done by owners of certificates of deposit and no cut off date was provided in that notice.

On June 16, 1943, the court made a third order (Record pp. 55-58) which authorized the Bankers Trust Company of New York to deliver to the Iowa-Des Moines National Bank and Trust Company the bonds remaining on deposit with it to be held by the Iowa-Des Moines National Bank until the surrender of the certificates of deposit and in that same order the court authorized the owners of certificates of deposit of Bankers Trust Company to surrender their certificates of deposit to the Iowa-Des Moines National Bank and Trust Company and to receive in return therefor the securities and cash authorized in the exchange plan. The court further ordered the Iowa-Des Moines National Bank to accept and receive the bonds as exchange agent and to perform administrative acts in connection with the exchange of bonds. In connection with the court order of June 16, 1943, it should particularly be noted:

(A) That there was no cut off date indicated or provided for with respect to the surrender of certificates of deposit to the Iowa-Des Moines National Bank.

(B) The owners of certificates of deposit were only authorized to surrender them to the Iowa-Des Moines National Bank and were not required to do so by any particular time under the order.

(C) Although the court orders of March 27 and April 17, 1943, provided for giving of notice, the order of June 16 did not provide for the mailing or publishing of notice and in fact no notice was given of the order of June 16, 1943.

On May 2, 1944, the court entered its so-called bar order which purported to cut off the rights of bondholders who failed to turn in their bonds for exchange on or before May 1, 1949 (Record pages 59-63). The court ordered publication notice in the Des Moines Register and New York Times which required bondholders to present their bonds for exchange to the Iowa-Des Moines National Bank and Trust Company on or before May 1, 1949.

In connection with this order, and the notice published pursuant thereto, it should be noted that:

a. The only thing required on the part of security holders was that they present their bonds for exchange to the Iowa-Des Moines National Bank and Trust Company on or before May 1, 1949.

b. As far as the order and the notice published are concerned there was nothing which required certificates of deposit to be turned in by any particular date in order to participate in the exchange.

On August 5, 1943, the exchange bank mailed a letter to Alexander J. Gillespie at 1175 Park Avenue which letter was returned because the addressee was not at the address given (Record pages 66-67). Even if received by Gillespie, there is nothing in the letter of August 5, 1943, which would indicate to him that he was required to turn in either his bonds or his certificate of deposit by any certain date in order to participate in the exchange. It merely calls to his attention that they are advised that

he is the owner of a certificate of deposit and that the bonds owned by him may now be exchanged for new securities under the plan of reorganization and advising him of his rights to receive in addition thereto certain cash. Nothing in the letter would indicate that if he failed to turn in his certificate of deposit on or before May 1, 1949, that he would be barred from participating in the exchange.

Gillespie was in compliance with the court order of May 2, 1944, and the notice published pursuant thereto in that his bonds were in the possession of the exchange bank at all times after July 1, 1943, and he should, therefore, be accorded the exchange rights provided in the plan of reorganization.

CONCLUSION.

The decision of the Court below was correct on the constitutional question of reasonable notice considered. It was also correct on grounds not considered. This court should deny review.

Respectfully submitted,

ROBERT J. BANNISTER,
PAUL F. AHLERS,
JAMES E. COONEY,
Attorneys for Respondent.